88-2038

Supreme Court, U.S.
FILED
MAY 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1989

MELVIN ALLEN LIVERMAN, JR.,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

I. Woodrow Crook, Jr.
Attorney at Law
Route 2, Box 186-A
Post Office Box 406
Smithfield, Virginia 23430
(804) 357-3050

QUESTION PRESENTED FOR REVIEW

Where the defendant invoked his right to have counsel present during custodial interrogation, was there a valid waiver of that right established and thus whether the use of his confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation.

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OPINIONS BELOW

The opinion of the Court of Appeals of Virginia is the only written opinion in this case and is included in the appendix hereto. The Supreme Court of Virginia simply denied the appeal and the order of the Supreme Court of Virginia is also enclosed herewith.

JURISDICTIONAL STATEMENT

This is an appeal from the decision of the Supreme Court of Virginia of February 21, 1989 which refused the petition for appeal of the Petitioner and order of the Supreme Court of Virginia of March 16, 1989 which denied the motion of the Petitioner which had been filed on or about March 1, 1989 wherein the petitioner informed the Supreme Court of Virginia that the Petitioner wished to appeal the decision to the Supreme Court of the United States upon the grounds of violation of the Constitutional rights of the Petitioner under the Fifth and Fourteenth

Amendment of the Constitution of the United States and because of the indigence of the Petitioner, the Petitioner requested the Supreme Court of Virginia to appoint able and competent counsel to assist him in perfecting his appeal and which further recited that H. Woodrow Crook, Jr., counsel appointed by the Circuit Court for the City of Suffolk, to assist the Petitioner in perfecting his appeal to the Court of Appeals and to the Supreme Court of Virginia is not qualified in the Supreme Court of the United States and thus not competent to handle the appeal of the Petitioner from the Supreme Court of Virginia to the Supreme Court of the United States.

Subsequently, notice of appeal was filed by the Petitioner on May 15, 1989 with the Supreme Court of Virginia and the Clerk of the United States Supreme Court.

A Jurisdictional Statement was filed by Petitioner on May 22, 1989 and counsel for

the Petitioner, who made an appearance at that time, was informed that counsel would have to be qualified and admitted before the United States Supreme Court within twenty-one days and that a Petition for Writ of Certiorari would have to be filed within twenty-one days upon the proper size paper pursuant to the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the U. S. Constitution.

Fourteenth Amendment to the U. S. Constitution.

STATEMENT OF THE CASE

The evidence of the Commonwealth was that Sarah Hobbs, a housewife in the City of Suffolk, was shot and killed in her home on October 8, 1984. Witnesses in the residential community had observed the Petitioner, a

salesman from Mehalko Exterminating Company, in the area shortly before the shooting. He claimed to have had car trouble to one witness and was seen by other witnesses walking down the street and driving around in the area.

The testimony rendered in the suppression hearing of February 22, 1985, indicates that the Petitioner was picked up at his home in Smithfield, Virginia, by Detective J. D. Bangley and other officers of the Suffolk Police Department on October 8, 1984, between 3:00 p.m. and 6:00 p.m. and taken to the police station in Suffolk, Virginia. The Petitioner was taken to an interrogation room and was never informed that he could leave said room until after he had given a confession and signed a consent to search form at 11:00 p.m. on October 8, 1984 (Tr. 6, 96, 113).

The Petitioner testified that he was advised of his constitutional rights and that he signed a waiver of those rights and gave a

statement explaining why he was in the area where the crime was committed which was written by Detective Bangley and later typed and submitted at the suppression hearing as Defendant's exhibit 1 (Tr. 9-10).

At the conclusion of giving the statement, the officers indicated that they wanted the Petitioner to consent to a paraffin test to determine if he had fired a weapon. The Petitioner stated that they accused him of murder at this stage and when they did he affirmatively asserted that he wanted an attorney. The Petitioner's request for an attorney is corroborated by the fact that it was typed on the written statement as his response at the end of the statement (Tr. 10, 101-103).

The Petitioner stated that when he requested the attorney, the officers left the room. That they came back and questioned him further and again he asserted his request for an attorney. He stated that the officers took

samples from his skin for the paraffin test over his objection and that each time the officers resumed the interrogation of him he would request an attorney. He stated that each time he requested an attorney the officer left the room and would remain out of the room for a few minutes and then come back and start talking to him again. He stated that he requested an attorney about nine times. At one point, he was given a telephone book to select an attorney from but he did not recognize the names of any attorneys. He further testified that there was no telephone in the room nor was he allowed to leave the room (Tr. 12-15, 92-93, 108).

Detective Bangley admitted that the Petitioner requested an attorney two or three times and that each time he requested an attorney the officers left the room. He admitted that they did not honor his request for an attorney nor did they attempt to make any determination whether he had funds to

employ counsel. In fact, the Petitioner was indigent and did not have counsel until the General District Court for the City of Suffolk appointed an attorney for him on October 9, 1984. Detective Bangley did not deny that the Petitioner's requests for an attorney were ignored (Tr. 131).

ARGUMENT

Petitioner contends that the trial court should have suppressed the statement taken from him during police interrogation as being in violation of his constitutional rights under the Fifth and Fourteenth Amendments to have counsel present during interrogation.

The case of Miranda v. Arizona, 384 U.S. 436, 473-74 (1966), established the rule that if the accused indicates he wishes to consult with an attorney, that he cannot be questioned further and any statements are not admissible.

The Miranda decision of 1966 was

reinforced by the United States Supreme Court decision of Robert Edwards v. State of Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S. Ct. 1880, decided May 18, 1981. In Edwards, the defendant, after being advised of his rights and given a statement, stated that he wanted to consult with an attorney before making any deal. The police officer provided the defendant with the telephone number of a county attorney and the defendant called the attorney. However, after hanging up, the defendant again stated that he wanted to have an attorney before making a deal. Thereafter, the defendant was further advised of his rights and gave a statement. The United States Supreme Court held that the statement was inadmissible where the defendant had invoked his right to have counsel present and counsel was not present when the statement was obtained.

At the suppression hearing, the Commonwealth cited the case of Oregon v.

Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830 (1983). This case held that once the defendant invokes his right to counsel, the admissibility of a later confession and response to police interrogation depends on whether the accused initiated the further communication. The real test there is whether the defendant actually initiated the conversation. In that case, all interrogation had ended and the defendant was being prccessed when he initiated conversation with the law enforcement officer. In the case now before the court, the interrogation continued and was initiated by Detective Bangley after each request for counsel and each absence of Detective Bangley and cannot, by any stretch of the imagination, be construed to be a waiver by the Petitioner and an initiation of communication with the officer by the Petitioner in view of his repeated requests for counsel.

In addition to the authorities cited by the Petitioner and the Commonwealth at the suppression hearing, on appeal, the Petitioner now cites the case of Smith v. Illinois, 469 U.S. 91, 83 L.Ed.2d 488, 105 S.Ct. 490, decided on December 10, 1984, which held that the Defendant's responses to continued police questioning should have ceased after the Defendant requested counsel.

In conclusion, there can be no question but that the Petitioner, when he realized that he was being accused of the crime to the point of samples of his skin moisture being taken over his objection, repeatedly requested assistance of counsel and that the police disregarded his requests but continued to question him and talk to him about the alleged offense until he finally gave a confession. That under the Miranda, Edwards, and Smith decisions of the United States Supreme Court, said confession is clearly inadmissible. It is just as clear that the

statement of the Petitioner was not the result of later initiated conversation by the Petitioner with the law enforcement officers whereby he intelligently and knowingly waived his requests for counsel. The in-custody interrogation and conversation with the Petitioner by the law enforcement officers never ceased in this case. The officers leaving the room for five minutes each time the Petitioner requested an attorney and then returning again to talk with the Petitioner about the offense was a continuing interrogation and effectively deprived the Petitioner of his right to counsel. The giving of the telephone directory to an indigent defendant does not meet the burden on the Commonwealth as stated by Miranda to demonstrate that the defendant knowingly and intelligently waived that right. To the contrary, the Petitioner persisted in requesting the presence of counsel for hours, on nine occasions, by his testimony and three

occasions by the detective's testimony.

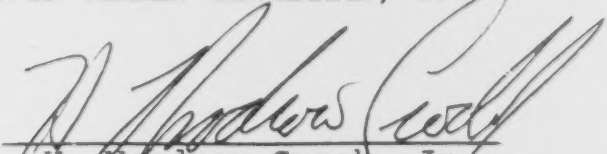
To comply with the law of the country as repeatedly enunciated by the United States Supreme Court, the statement of the Petitioner in this case has to be suppressed as having been elicited from the Petitioner following his repeated requests for counsel. The convictions of the Petitioner should be reversed and the case remanded to the trial court with direction to suppress the said statements.

CONCLUSION

For the foregoing reasons, Petitioner Liverman respectfully requests this Court to grant his Petition for Certiorari.

Respectfully submitted,

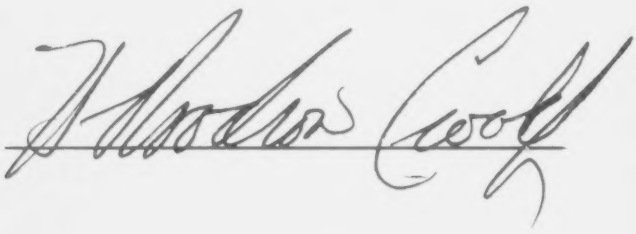
MELVIN ALLEN LIVERMAN, JR.

By: 

H. Woodrow Crook, Jr.
Post Office Box 406
Route 2, Box 186-A
Smithfield, Virginia
23430
(804) 357-3050

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Petition for Writ of Certiorari was mailed, postage prepaid, to Honorable Mary Sue Terry, Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219, this 1st day of June, 1989.



APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK

COMMONWEALTH

V. STATUTORY BURGLARY
MURDER
USE OF A FIREARM

MELVIN ALLEN LIVERMAN, JR.

It appearing to the Court that on the 22nd day of February, 1985, the attorney for the defendant moved the Court to suppress as evidence, all statements taken from him by Detective J. D. Bangley of the Suffolk Police Department on the 8th day of October, 1984;

And the Court having at such time taken the aforesaid motion under advisement, the Court doth now find that Melvin A. Liverman, Jr., knowingly and intelligently relinquished or abandoned his right to an attorney and that the defendant's confession and statements made to the detective are

admissible and the motion to suppress is denied in accordance with the opinion of the Court contained in its letter to counsel dated the 29th day of April, 1985.

Entered the 17th day of September, 1985

s/Benjamin A. Williams, Jr., JUDGE

Benjamin A. Williams, Jr.

VIRGINIA:

In the Court of Appeals of Virginia on Monday the 11th day of January, 1988.

Melvin Allen Liverman, Jr.,

Appellant,

against Record No. 0258-86-1
Circuit Court Nos. F62-85/4413, F-63-85/4414 and F64-85/4415

Commonwealth of Virginia,

Appellee.

From the Circuit Court of the City of Suffolk

Before Judges Baker, Barrow and Hodges

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the panel finds the following:

(1) The trial court did not err in denying the appellant's motion to suppress his statement which was voluntarily initiated by appellant subsequent to his request for advice of counsel. There was sufficient evidence for the judge to conclude that appellant knowingly and intelligently waived his constitutional right against self

incrimination. Bradshaw v. Commonwealth, 228 Va. 484, 323 S.E.2d 567 (1984).

(2) The trial court did not err in refusing to dismiss juror, Joseph F. Joseph, because his wife was employed at a forensic laboratory in Richmond. There was no evidence to show his wife had any knowledge of the case and the court properly concluded that the juror stood indifferent to the cause. Clozza v. Commonwealth, 228 Va. 124, 321 S.E.2d 273 (1984).

(3) The trial court did not err in refusing to advise the jury of the procedures followed when a defendant is acquitted by reason of insanity. The statutory instructions are directed to the court and not the jury. Spruill v. Commonwealth, 221 Va. 475, 271 S.E.2d 419 (1980).

(4) The trial court did not err in refusing to grant a mistrial because of statements made by the Commonwealth's Attorney during his objection to a hearsay

statement of appellant which allegedly inferred that appellant would not testify. Based on the objectional language, the court did not abuse its discretion by denying the motion.

(5) The trial court did not err in refusing to grant instruction 9A. The court properly instructed the jury that the burden of proof for establishing insanity as a criminal defense is "by the greater weight of the evidence." Christian v. Commonwealth, 202 Va. 311, 117 S.E.2d 79 (1960).

(6&7) The trial court did not err in refusing to grant instructions on irresistible impulse and second degree murder. There was no evidence to support granting such instructions.

Accordingly, the petitioner for appeal is denied.

The trial court shall allow court-appointed counsel the fee set forth below and also his necessary direct

out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the trial court.

A Copy,

Teste:

David B. Beach, Clerk

By: s/Debra A. R. Clem

Deputy Clerk

Costs due the Commonwealth by appellant in Court of Appeals of Virginia:

Attorney's fee	$300.00 plus his costs and expenses
Filing fee	$25.00

Teste:

David B. Beach, Clerk

By: s/Debra A. R. Clem

Deputy Clerk

VIRGINIA:

In the Supreme Curt of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 21st day of February, 1989.

Melvin Allen Liverman, Jr.,

Appellant,

against Record No. 880127
Court of Appeals No. 0258-86-1

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of the City of Suffolk shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

A Copy,

Teste:

David B. Beach, Clerk

By: s/
Deputy Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorney's fee	$300.00 plus his costs and expenses
Filing fee	$25.00

Teste:

David B. Beach, Clerk

By: s/
Deputy Clerk

V I R G I N I A :

IN THE SUPREME COURT OF VIRGINIA

MELVIN ALLEN LIVERMAN, JR.,
Appellant

against

Record No. 880127
Court of Appeals No.
0258-86-1

COMMONWEALTH OF VIRGINIA,
Appellee

M O T I O N

Pursuant to Rule 5:41:

Comes now the appellant, Melvin Allen Liverman, Jr., by counsel, who moves the Supreme Court of Virginia as follows:

(1) That the appellant wishes to appeal the decision of the Supreme Court of Virginia to the Supreme Court of the United States;

(2) That the appellant may seek a writ of review or certiorari from the Supreme Court of the decisions of the Circuit Court of the City of Suffolk, the Court of Appeals of Virginia and the Supreme Court of Virginia concerning the violation of the constitutional rights of the appellant under

the Fifth and Fourteenth Amendments of the Constitution of the United States;

(3) That the appellant is indigent and without funds to employ counsel to assist him in the perfection of his appeal to the Supreme Court of the United States and requests the Supreme Court of Virginia to appoint able and competent counsel to assist him in perfecting said appeal;

(4) That H. Woodrow Crook, Jr., counsel appointed by the Circuit Court for the City of Suffolk to assist the appellant in perfecting his appeal to the Court of Appeals of Virginia and to the Supreme Court of Virginia is not qualified in the Supreme Court of the United States and thus is not competent to handle the appeal of the appellant from the Supreme Court of Virginia to the Supreme Court of the United States.

IN CONSIDERATION WHEREOF, the appellant, by counsel, moves the Supreme Court of Virginia to appoint competent counsel to

assist the appellant in perfecting his appeal of the decision of the Supreme Court of Virginia of February 21, 1989, to the Supreme Court of the United States.

MELVIN ALLEN LIVERMAN, JR.

By: s/H. Woodrow Crook, Jr.
Counsel

H. Woodrow Crook, Jr.
Attorney at Law
Post Office Box 406
Smithfield, Virginia 23430

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion was mailed to C. Phillips Ferguson, Commonwealth's Attorney, City of Suffolk, 441 Market Street, Suffolk, Virginia 23434, and to Mary Sue Terry, Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219, this 1st day of March, 1989.

s/H. Woodrow Crook, Jr.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 16th day of March, 1989.

Melvin Allen Liverman, Jr.,

Appellant,

against Record No. 880127
Court of Appeals No. 0258-86-1

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

On March 2, 1989 came the appellant, by counsel, and filed a motion praying that the Court appoint counsel to assist him in perfecting an appeal to the United States Supreme Court.

On consideration whereof, the motion is denied.

A Copy,

Teste:

s/David B. Beach

Clerk

V I R G I N I A :

IN THE SUPREME COURT OF VIRGINIA

MELVIN ALLEN LIVERMAN, JR.,

Appellant

against

Record No. 880127
Court of Appeals
No. 0258-86-1

COMMONWEALTH OF VIRGINIA,

Appellee

NOTICE OF APPEAL

Notice is hereby given that Melvin Allen Liverman, Jr., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order refusing the petition for appeal entered in this action on February 21, 1989.

This appeal is taken pursuant to 28 U.S.C Section 2101.

The Clerk will please prepare a transcript of the record in this case consisting of the entire record received by

the Supreme Court of Virginia from the Court of Appeals of Virginia and particularly, the transcript of the suppression hearing heard in the Circuit Court for the City of Suffolk, Virginia, on February 22, 1985.

The following questions are presented by this appeal:

1. Did the State court apply an erroneous standard for determining waiver of right to counsel by focusing on voluntariness of confession rather than on whether defendant understood his right to counsel and intelligently and knowingly relinquished it. U.S.C.A. Const. Amend. 5.

2. Where the defendant invoked his right to have counsel present during custodial interrogation, valid waiver of that right can not be established by showing only that he responded to police initiated interrogation therefore the use of his confession against him at his trial violated his rights under the Fifth and Fourteenth

Amendments to have counsel present during custodial interrogation. U.S.C.A. Const. Amend. 5,14.

3. Once an accused has expressed the desire to deal with police only through counsel, he is not to be subjected to further interrogation until counsel has been made available to him. U.S.C.A. Const. Amend. 5.

Dated this 15th day of May, 1989.

s/H. Woodrow Crook, Jr.
Attorney for Appellant

H. Woodrow Crook, Jr.
Attorney at Law
Post Office Box 406
Route 2, Box 186-A
Smithfield, Virginia 23430
(804) 357-3050

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed, postage prepaid, to C. Phillips Ferguson, Commonwealth's Attorney for the City of Suffolk, 441 Market Street, Room 223, Post Office Box 1811, Suffolk, Virginia 23434, and

to Honorable Mary Sue Terry, Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219, this 15th day of May, 1989.

s/H. Woodrow Crook, Jr.

88-2038

Supreme Court, U.S.
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SEP 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____Term, 1989

MELVIN ALLEN LIVERMAN, JR.,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

C. Phillips Ferguson
Commonwealth's Attorney
City of Suffolk
P. O. Box 1811
Suffolk, Virginia 23434
(804) 934-3111, Ext. 300

QUESTION PRESENTED FOR REVIEW

Where the defendant invoked his right to have counsel present during custodial interrogation, was there a valid waiver of the right established and thus whether the use of his confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation.

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No._____

In The

SUPREME COURT of the UNITED STATES

_____ Term, 1989

MELVIN ALLEN LIVERMAN, JR.,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent, the Commonwealth of Virginia, respectfully prays that the petition for Writ of Certiorari sought by petitioner to review the judgment of the Virginia Supreme Court entered on February 21, 1989, be denied.

STATEMENT OF THE CASE

Petitioner's statement of the case is incomplete. Therefore, the Commonwealth would add the following facts.

At the suppression hearing, Detective J. D. Bangley testified that he arrived at the Suffolk Police Department at approximately 3:00 p.m. on the day of the shooting. At 6:00 p.m., the defendant called the Suffolk Police Department because he had received information that the police were looking for him. The officer who answered the telephone call advised the defendant that they would like to talk to him about something. The defendant told the officer that he would come to police headquarters. Within seconds, the defendant called the Suffolk Police Department a second time and informed the officer that his car was not working. At that point, the officer advised the

defendant that the police would be glad to give him a ride from Smithfield to Suffolk. The defendant agreed to this arrangement. (Tr. pp. 18-20 & 96). Detective Bangley and Detective W. M. Brooks left the Suffolk Police Department at 6:00 p.m., arrived in Smithfield at the defendant's home at 6:30 p.m., and returned to Suffolk with Liverman at 7:00 p.m. (Tr. p. 129). In route to Suffolk, the only conversation about the investigation was initiated by the defendant when he asked the detectives what they wanted to talk to him about. Detective Bangley's response was that they had heard that he had been in Riverview that day and they wanted to know if he had seen anything at the Hobbs' residence because there had been a shooting incident involving Mrs. Hobbs. Detective Bangley made no reference to Mrs. Hobbs being dead or alive. That conversation was the only reference made

to the investigation. (Tr. p. 98).

After the defendant arrived at the Suffolk Police Department, Detective Bangley advised him of his Miranda rights at 7:09 p.m. (Tr. p. 99). The defendant executed a legal rights form. At this point, the defendant was advised that Mrs. Hobbs had died. (Tr. p. 100). At 7:10 p.m., the defendant made a statement in which he denied knowing anything about the incident. Detective Creekmore entered the room that Detective Bangley and the defendant were in and asked the defendant if they could take a gun powder residue test. He explained to the defendant exactly how and where it would be taken and what the results would show. The defendant said that he wanted a lawyer before he took any test. (Tr. pp. 27 & 103). Detective Bangley then asked the defendant if the statement which he just made was freely and voluntary given. The defendant answered

"I want to talk to a lawyer." (Tr. pp. 29 & 102). Detective Bangley ceased all questioning and left the room. (Tr. pp. 29 & 103).

At this point, Detective Bangley, Detective Creekmore and Lieutenant Cipra observed the defendant doing something with his hands, rubbing his hands on his pants and picking at his fingernails. Lieutenant Cipra entered the room and gave the defendant a Suffolk phone book and a Norfolk/Portsmouth phone book and advised him to find an attorney. (Tr. p. 104). Lieutenant Cipra left the room and he, Detective Bangley and Detective Creekmore observed on the monitor that the defendant was licking his hands in the exact location where he had been advised the test would be taken and then began rubbing his hands on his pants. Lieutenant Cipra, Detective Bangley and Detective Creekmore then went into the room and Lieutenant Cipra advised

the defendant that the test would be taken but that no one would question him. (Tr. p. 104). The test was taken.

The three officers then left the defendant alone with the phone books. The officers viewed the defendant on the monitor as he was looking through the phone books. After approximately ten minutes. Detective Bangley returned to the room and asked the defendant if he had found an attorney.

At this point, the defendant began telling Detective Bangley various incidents that had happened to him. He told Bangley he could not trust anyone and that he had had threats made upon his life. He said he had consulted with a judge in Richmond and talked with Judge Godwin in Suffolk but that neither believed him and nothing had been done. The defendant continued by talking about incidents which involved people at various schools he had attended,

Chief Jackson of the Suffolk Police Department and G. S. Hobbs and Trip Hobbs, the husband and son, respectively, of the decedent. (Tr. pp. 105, 120, 122). Detective Bangley informed the defendant that if these things were true and if he, Liverman, wished to talk to somebody about these matters in greater detail, then he would listen. (Tr. p. 122). The defendant then told Detective Bangley that he wanted to talk to him about them but that he did not want to say it out loud but that he would write it down. Detective Bangley advised the defendant that he would give the defendant a pen and paper and that he would leave the room so the defendant would have the privacy to write down what he had to say. Detective Bangley gave the defendant the pen and paper and then left the room. (Tr. p. 122). Liverman was left alone.

Detective Bangley observed the

defendant on the monitor. When the defendant stopped writing, the detective returned to the room and read what the defendant had written. The defendant had written that he had killed Sarah Hobbs. After Detective Bangley read the paragraph, he advised the defendant that "if he would, [he] would like to talk to him some more about what he had wrote down." The defendant told the detective that he would talk to him. (Tr. p. 124).

The second statement was taken by Detective Bangley at approximately 8:00 p.m. (Tr. p. 113). Detective Bangley testified there were only three police officers involved in the investigation. He further testified that he entered the room only three times and he was the only one present during the first statement and during the second statement. He also stated that no one ever told the defendant that he had to talk to the police. The

defendant was not threatened or forced to talk with the detective. (Tr. p. 124).

Detective Bangley read each page of the second statement to the defendant and the defendant signed and initialed each page and signed the statement. (Tr. pp. 125-127).

At the suppression hearing, the defendant testified that he did not make the statements which were introduced into evidence. He stated that the statement and signatures were forgeries. (Tr. pp. 10, 70, 74, 75, 78, 79, 83, 84). He further testified that the police were in and out of the room approximately twelve times, that they threatened him, and that they told him that they knew he had killed Mrs. Hobbs. However, Liverman could not identify any of the officers except Detective Bangley. Liverman testified that he requested an attorney on at least twelve occasions. (Tr. pp. 29, 34, 36, 41, 44,

50, 51, 66, 67, 68).

The trial court found Detective Bangley to be the credible witness and held that the statement was admissible. Consequently, at the trial, Detective Bangley testified with regard to the defendant's actions and behaviors on October 8, 1984, and read the inculpatory statement to the jury.

REASONS FOR DENYING THE WRIT AND ARGUMENT

THIS IS NOT A PROPER CASE FOR EXERCISE OF THIS COURT'S CERTIORARI JURISDICTION.

A. The issue is not properly before this Court because the question presented is not the same claim litigated below, nor is it the issue argued in the petition for a writ of certiorari.

The question presented by petitioner is not the same issue which was litigated in the appellate courts below. Petitioner now seems to assert that regardless of how the interrogation of petitioner was reinitiated, there was no valid subsequent

waiver of his right to counsel. However, in the body of the petition and in the state courts, petitioner focused his argument upon the reinitiation issue. This Court should not grant a writ of certiorari to review a claim that has not been passed upon by the appropriate appellate court. Because the issue was not addressed to Supreme Court of Virginia or the Court of Appeals of Virginia, the record is not fully developed and petitioner has bypassed an available remedy. In keeping with established practice, the Court should refuse "to decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

B. The issue presented in this case is not of sufficient importance to warrant exercise of this Court's certiorari jurisdiction.

Petitioner's claim fails to raise an issue which is worthy of this Court's

exercise of certiorari jurisdiction. Presumably, petitioner would argue that, pursuant to Rule 17.1(c) of the Rules of the Supreme Court of the United States, the state courts decided a federal question in a way in conflict with applicable decisions of this Court. Certainly, no other considerations governing review on certiorari are applicable in this case. However, there is, in fact, no conflict and therefore this is not an appropriate case to be considered by this Court. This is not a situation, such as Oregon v. Mathiason, 429 U.S. 492 (1977), in which certiorari was granted because the state court had "read Miranda too broadly." Id. at 493.

Rather, this case involves nothing more than petitioner's disagreement with the state court's resolution of factual matters. It is well settled that this Court will not exert its jurisdiction merely

to review a decision of a state court upon a question of fact except "where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts." Fiske v. Kansas, 274 U.S. 380, 385-86 (1927). Indeed, "this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." Rogers v. Lodge, 458 U.S. 613, 623 (1982).

> A court of law, such as this Court is, rather than a court for correction of errors and factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Manufacturing Company v. Linde Air Products Company, 336 U.S. 271, 275 (1949). In this case, as will be discussed below, there was ample evidence

to establish that as a matter of fact the petitioner reinitiated the interrogation and he subsequently voluntarily waived his right to counsel. His complaint, in essence, is nothing more than an assertion that his testimony, rather than that of the police officers, should have been accepted. Such a distinct factual question should not be examined by this Court. See Grayson v. Harris, 267 U.S. 352, 258 (1925); Portland Ry. Co. v. Railroad Commission, 229 U.S. 397, 412 (1913); Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1952).

C. There is no merit to Petitioner's claim that he was denied his right to counsel under the Fifth and Fourteenth Amendments.

In Bradshaw v. Commonwealth, 228 Va. 484, 323 S.E.2d 567 (1984), the defendant contended that the trial court should have suppressed his confession because it was obtained while he was in custody and after

he had requested an attorney. The police advised the defendant of his Miranda rights and he executed a written waiver of these rights. During the interview, the defendant denied any involvement in the crime being investigated. The police informed the defendant that several witnesses had seen his car at the scene of the crime and that he killed the victim because of his jealousy concerning his wife. At that point, the defendant said that he wanted to talk to an attorney. The police ceased interrogation and requested that the defendant have his attorney contact the police to discuss the possibility of a polygraph examination. The police seized two 12-gauge shotguns and told the defendant that they wanted to have them tested. As the officer was writing a receipt for one of the

guns, Bradshaw spontaneously remarked, "That's not the one that did it." The police officer asked if he wanted "to talk about it." Id. at 489. The defendant said that he did. He then gave a fifteen to twenty minute statement admitting that he shot the victim. The defendant repeated the statement to his father in the presence of the police and later gave a written signed confession.

The Virginia Supreme Court held that an accused may waive his constitutional right to counsel, provided the waiver is made voluntarily, knowingly and intelligently. The Court continued by stating that whether a suspect makes a knowing and intelligent relinquishment or abandonment of his rights depends on the totality of the facts and circumstances of each

case. Id.

> During a custodial interrogation, if a suspect requests an attorney, the interrogation must cease until an attorney is present. (cites omitted). Such a request, however, does not protect a suspect when he makes a spontaneous admission not induced or initiated by the police, (cite omitted), or when 'the accused himself initiates further communication, exchanges or conversations with the police.' (cite omitted). Id. at 490.

The Court in Bradshaw held that the statement was made voluntarily and constituted "a knowing and intelligent relinquishment or abandonment of a known right." Id. (quoting Edwards v. Arizona, 451 U.S. 477, 482, reh'g denied, 452 U.S. 973 (1981)). The Bradshaw case is on all fours with the case at bar. Liverman denied any involvement in the murder in his first statement. After Detective Creekmore explained the gun powder residue

test and requested that they be allowed to take one, Liverman requested an attorney before the taking of a test. Detective Bangley proceeded to ask the standard final three non-offense related questions and Liverman responded, "I want to speak to an attorney" after the second question. Detective Bangley ceased all questioning immediately and left the room. Detective Bangley scrupulously honored the defendant's request for counsel.

Liverman was provided with a Suffolk phone book and a Norfolk phone book and was told to find an attorney. When Detective Bangley asked Liverman if he had found an attorney, Detective Bangley was merely asking a standard custodial question. That question was not interrogation. The term "interrogation" does not refer to words or actions on the part of the police that are normally attendant to arrest and custody. Oregon

v. Bradshaw, 103 S.Ct. 2830, 2835 (1983); Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689 (1980).

In Bunch v. Commonwealth, 225 Va. 423, 435, 304 S.E.2d 271 (1983), the Virginia Supreme Court held that police may legitimately inquire whether a suspect has changed his mind about speaking to an attorney. The Court further stated that the police officer's inquiry whether Bunch "felt he was ready to sit down and go over the case" amounted to nothing more than an effort to ascertain if Bunch had changed his mind about wanting an attorney, and, hence, did not amount to police-initiated interrogation within the meaning of Edwards. Id. at 435.

In the case at bar, Detective Bangley merely asked Liverman if he had found an attorney. Detective Bangley never asked Liverman if he was ready to go over the case. Therefore, Detective Bangley's

inquiry did not go as far as the inquiry in Bunch which the Court held to be a legitimate inquiry and not police-initiated interrogation. After Liverman gave his narrative statement about threats on his life and various incidents involving G. S. Hobbs, Trip Hobbs and others, to Detective Bangley, the detective merely advised Liverman that if these things were true and if he, Liverman, wished to talk about these matters in greater detail, then he would listen. This statement was the same statement the detective in Bradshaw made to the defendant in that case and which the Court held not to be interrogation. Once Liverman re-initiated communication with Detective Bangley, he was no longer protected from interrogation. Bradshaw, 228 Va. at 490.

The defendant cites Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), in support of his motion to suppress the

confession. In Edwards, the defendant requested an attorney "before making a deal" and the questioning ceased. The defendant was taken to the jail and the next morning, two detectives came to the jail to talk to him. The guard told Edwards that "he had" to talk and he then took Edwards to the detectives. Id. at 1882. The Court held that an accused having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. Id. at 1885 (emphasis added). The Court continued by stating that had Edwards initiated the meeting, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them

against him at trial.

In the case at bar, unlike Edwards, Liverman voluntarily initiated further communication, exchanges, or conversations with the police.

When Liverman initiated communication with the police, he knowingly and intelligently waived his previously invoked right to counsel and thus became subject to further interrogation by the authorities. Id. at 1885. Once Liverman waived his right to counsel, the waiver continued to be in effect throughout any subsequent custodial interrogation. After Liverman initiated communication with the police, he did not thereafter request counsel. Furthermore, at no time did Detective Bangley or any other police officer indicate to Liverman that "he had" to talk. Finally, Detective Bangley did not resume questioning Liverman until Liverman specifically chose to talk with him.

The defendant also cites Smith v. Illinois, 105 S. Ct. 490 (1984), as controlling authority for the case at bar. However, the United States Supreme Court decision in that case was a narrow one. Id. at 495. The Court held that the rule which states "[a]n accused in custody, 'having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him,' (cite omitted) unless he validly waives his earlier request for the assistance of counsel," embodies two distinct inquiries. Id. at 492-93.

> First, courts must determine whether the accused actually invoked his right to counsel. (cites omitted). Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only in finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. (cite omitted). Id. at 493.

The Court stated "[t]his case concerns the threshold inquiry: whether Smith invoked his right to counsel in the first instance." Id. An accused's subsequent statements are relevant only to the question whether the accused waived the right he invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together. Id. at 494. The Court held "only that, under the clear logical force of settled precedent, an accused's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent statements are relevant only to the distinct question of waiver." Id. at 495.

The issue in the case at bar is whether the defendant waived the right he invoked. Therefore, Smith v. Illinois, supra, is not applicable.

The defendant also contends that the police should have done more than give the defendant two phone books. Detective Bangley testified that he asked the defendant if he had found an attorney because if he had then he would have allowed the defendant to contact one. The decision in Miranda v. Arizona, 384 U.S. 436 (1966).

> does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. Id. at 474.

At 7:09 p.m., Detective Bangley advised Liverman of his Miranda rights and Liverman executed a Suffolk Police Department Legal Rights Advice Form. Liverman knew that he was entitled to a lawyer and in fact invoked this right. He was provided with two phone books so that he could find a

lawyer. The Suffolk Police did not question Liverman during the period of time that the Fifth Amendment privilege was in effect. However, once Liverman voluntarily initiated conversation with Detective Bangley, he waived his previously invoked right to counsel and, therefore, was subject to questioning by the police.

Even then, Bangley questioned Liverman only after Liverman (1) knowingly and intelligently waived his right to counsel; (2) initiated conversation with Detective Bangley in narrative form; (3) out of the presence of Detective Bangley wrote that he had murdered Mrs. Hobbs; and (4) specifically chose to talk with Detective Bangley.

In short, the Suffolk Police made no threats, promises or inducements to Liverman to get him to talk. Liverman was properly advised of his rights and he understood those rights. Within a short

period of time after requesting an attorney, he changed his mind and gave a voluntary statement without any impropriety on the part of the police whatsoever.

The issue of whether his constitutional right to counsel was violated rests on the credibility of the witnesses. The evidence produced at the suppression hearing clearly and convincingly established the credibility of Detective Bangley and discredited the defendant.

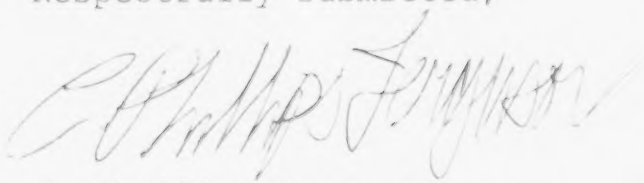
The Virginia Supreme Court has ruled that in testing the credibility and weight to be ascribed to the evidence, trial courts must be given the wide discretion to which a living, rather than printed, record logically entitles it. Bradley v. Commonwealth, 196 Va. 1126, 1136, 86 S.E.2d 828 (1955). When this rule of law is considered with the Commonwealth's evidence, it is clear that the trial judge made his decision properly. It was based

soundly and firmly upon the law and facts presented.

CONCLUSION

The Appellant's Petition for a Writ of Certiorari is wholly without merit. It has basis in neither fact nor law. Therefore, the Commonwealth of Virginia respectfully requests that this case not be reviewed and that the decision of the Virginia Supreme Court not be disturbed.

Respectfully submitted,



C. Phillips Ferguson
Commonwealth's Attorney for the
City of Suffolk
Counsel For Respondent
The Commonwealth of Virginia

C. Phillips Ferguson
Commonwealth's Attorney
P. O. Box 1811
Suffolk, Virginia 23434

CERTIFICATE OF SERVICE

I, C. Phillips Ferguson, Commonwealth's Attorney for the City of Suffolk, Virginia,

hereby certify that a true copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari was this 5th day of September, 1989, mailed postage pre-paid to H. Woodrow Crook, Jr., Esquire, Counsel for Petitioner, P. O. Box 406, Smithfield, Virginia 23430, and to The Honorable Mary Sue Terry, Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219.

C. Phillips Ferguson

C. Phillips Ferguson
Commonwealth's Attorney